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No. 76-1576

In the Supreme Court of the United States

OCTOBER TERM, 1976

JESSE A. HELMS, ET AL., PETITIONERS

v.

CYRUS R. VANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
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Department of Justice,
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Petitioners, members of Congress and a resident of the Canal Zone, brought this action for declaratory relief against the President, the Secretary of State, and a United States Ambassador, seeking a declaration that current negotiations concerning the status of the Panama Canal Zone infringe Congress' allegedly exclusive constitutional power to dispose of federal property under Article IV, Section 3, of the Constitution.[1] The complaint (Pet.

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[1]Petitioners also sought a preliminary injunction to bar the respondents from changing the status quo in the Canal Zone pending the determination of their action on the merits (Pet. App. 17a). The district court denied petitioners' motion for a preliminary injunction and petitioners appealed (Pet. App. 3a). The court of appeals affirmed the denial of the preliminary injunction at the same time it affirmed the district court's dismissal of the complaint (Pet. App. 1a).

App. 33a-39a) alleges that the respondents intend to transfer ownership and dominion over the Canal Zone to the Republic of Panama in derogation of congressional authority "to determine whether, and the manner in which, territory or other property belonging to the United States shall be disposed of and the jurisprudence which is to be applied to citizens of the United States resident in its territories" (Pet. App. 39a).

The district court dismissed the complaint. The court held, first, that the case was not ripe for judicial review because the harm petitioners alleged was purely speculative (Pet. App. 4a-5a):

> Since no one, not even the negotiators, yet knows the exact contours of any proposed agreement—or even whether there will be an agreement—the injury alleged here is conjectural in the purest sense.

Moreover, the court observed (Pet. App. 5a):

> [I]n any event, it appears doubtful that the executive will be able to avoid the power of Congress in this matter since any treaty negotiated will be presented to the Senate for approval and perhaps to the entire Congress for implementing legislation.

Second, the court held that judicial review of the complaint, "at least at this point" (Pet. App. 9a), is precluded by the political question doctrine. Relying on principles set forth in *Baker* v. *Carr*, 369 U.S. 186, 217, and *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319, the court noted "the very substantial effect which any decision by this court might have upon the negotiating process—and treaty negotiations are indisputably matters for the executive and not for the judiciary" (Pet. App. 8a).

Third, the court held that petitioners lacked standing. The court noted that petitioners' generalized claim that executive negotiations would deprive them of their legislative capacity to consider the appropriate dispositions of the Canal Zone asserted an alleged injury that would occur only in the future, was speculative, and was of doubtful merit in any event, "especially in the case of the Senators who are plaintiffs since any treaty must be ratified by the Senate" (Pet. App. 11a).

The court of appeals summarily affirmed without opinion (Pet. App. 1a).

The decision of the court of appeals was correct and does not warrant further review. There is little to add to the well reasoned opinion of the district court, upon which we rely here.

The district court correctly dismissed the complaint as not ripe for adjudication. As the court noted (Pet. App. 5a), the executive branch has been conducting negotiations with the government of Panama for thirteen years, and petitioner Helms admitted in his affidavit (Pet. App. 29a) that he did not know whether "the State Department has any presently firm intention of turning over a portion of the Zone to Panamanian forces before this question of authority can be settled in the Courts." Moreover, as the affidavit of the Acting Assistant Secretary of State for Inter-American Affairs states (Pet. App. 23a-24a), the executive branch "would not, and could not, alter the present status of the Panama Canal or the Canal Zone by unilateral action," without Senate approval of a treaty. Petitioners' apprehension in that respect is not only speculative but groundless. Since no treaty has yet been negotiated, and any treaty that is negotiated will not become binding until it has been ratified by the

Senate, this suit plainly lacks sufficient immediacy to warrant adjudication on the merits. See *O'Shea* v. *Littleton*, 414 U.S. 488.

The district court also correctly ruled that the complaint presents a non-justiciable political question. Under the Constitution, the conduct of international relations and the negotiation of treaties is primarily, and in some respects exclusively, the province of the President. *United States* v. *Curtiss-Wright Corp.*, *supra*, 299 U.S. at 319. The political question doctrine bars judicial intervention into matters, such as the conduct of delicate treaty negotiations, that are constitutionally committed to one of the political branches of government. *Baker* v. *Carr*, *supra*, 369 U.S. at 211-212.[2]

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[2]Petitioners also have failed to establish that they have standing to bring this suit. Six of the petitioners are members of Congress who claim to sue in their official capacities, on the theory that the Executive's conduct of treaty negotiations may, or allegedly will, impair their ability to consider and vote on the matters under negotiation. Similar contentions were rejected in *Metcalf* v. *National Petroleum Council*, No. 76-1223, decided February 18, 1977 (C.A. D.C.), and *Harrington* v. *Bush*, No. 75-1862, decided February 18, 1977 (C.A.D.C.). The six legislators and Mr. Drummond, who is suing as an individual and purported representative of the class of all United States citizens residing in the Canal Zone, also assert standing "as individual citizens and taxpayers to preserve and declare the Constitutional allocations of powers as between the executive and the legislative branches of this government" (Pet. App. 34a). Such a generalized claim is common to the citizenry at large and insufficient to confer standing. See *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.